

**This Opinion is Not a
Precedent of the TTAB**

Mailed: June 16, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re MacDonald Plummer

Serial No. 88155158

Jacob W. Neu of Bradley Arant Boult Cummings, LLP for MacDonald Plummer.

Emma Sirignano, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

Before Thurmon, Deputy Chief Administrative Trademark Judge, and
Cataldo and Taylor, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, MacDonald Plummer, seeks registration on the Principal Register of
the mark BREAUXS (in standard characters), identifying the following goods in

International Class 11:

Grill accessories, namely, charcoal grill conversion units for converting
charcoal grills to electric smokers; Air fryers; Barbecue grills; Charcoal
grills; Deep fryers, electric; Deep fat fryers; Electric boilers; Electric
fryers; Electric grills; Electric indoor grills; Electric outdoor grills;
Electric panini grills; Fitted covers for barbecue grills; Gas grills; Gas-
powered deep fat fryers; Oil-free electric fryers.¹

¹ Application Serial No. 88155158 was filed on October 15, 2018, based upon Applicant's
allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the
Trademark Act, 15 U.S.C. §1051(b).

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that the proposed mark is primarily merely a surname.

When the refusal was made final, Applicant appealed.² We affirm the refusal to register.

Section 2(e)(4) of the Trademark Act provides that absent a showing of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), registration on the Principal Register must be refused if the proposed mark is "primarily merely a surname."³ A term is primarily merely a surname if, when viewed in relation to the goods or services for which registration is sought, its primary significance as a whole to the purchasing public is that of a surname. *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411 (Fed. Cir. 2017); *see also In re Beds & Bars Ltd.*, 122 USPQ2d 1546, 1548 (TTAB 2017); *In re Eximius Coffee, LLC*, 120 USPQ2d 1276, 1277 (TTAB 2016); *In re Integrated Embedded*, 120 USPQ2d 1504 (TTAB 2016).

Various inquiries may be considered in the factual determination of whether the purchasing public would perceive a proposed mark as primarily merely a surname, including the following that are relevant in this case: whether the term has a non-surname, "ordinary language" meaning; the extent to which the term is used by others as a surname – i.e., rarity; and whether the term has the structure and

² Applicant and the Examining Attorney filed briefs. Applicant did not file a reply brief.

³ Applicant has not claimed that BREAUXS has acquired distinctiveness under Trademark Act Section 2(f). Nor has Applicant amended the application to seek registration on the Supplemental Register.

pronunciation of a surname.⁴ See *In re Etablissements Darty et Fils*, 759 F.2d 15, 225 USPQ 652, 653-54 (Fed. Cir. 1985); *Eximius Coffee*, 120 USPQ2d at 1278 n.4 (reviewing factors from *Darty* and *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-34 (TTAB 1995) and noting there is no need to discuss other inquiries for which the record lacks relevant evidence); *In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1719 & 1721 (TTAB 2016) (noting the consideration, if there is relevant supporting evidence of record, “of an alternative perceived meaning (which may include the perception of the mark as a coined term)”). We conduct our analysis from the perspective of the purchasing public because “it is that impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance.” *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975) (quoting *Ex parte Rivera Watch Corp.*, 106 USPQ 145, 149 (Comm’r Pat. 1955)).

⁴ The proposed mark in this case is displayed in standard characters. Accordingly, it is unnecessary to consider whether any stylization of the lettering is distinctive enough to create a separate commercial impression. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007); *Integrated Embedded*, 120 USPQ2d at 1506 n.4.

Applicant further asserts that “where (as here) no one involved in Applicant’s business carries the surname in question, the second inquiry is irrelevant or neutral.” 4 TTABVUE 6 (Applicant’s brief.) We agree. *In re Thermo LabSystems Inc.*, 85 USPQ2d 1285, 1287 (TTAB 2007) (quoting *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2001) (“[T]hat ‘a proposed mark is not applicant’s surname, or the surname of an officer or employee, does not tend to establish one way or the other whether the proposed mark would be perceived as a surname.’”)).

A. BREAUX is not a rare surname.

In support of the refusal, the Examining Attorney introduced the following evidence:⁵

- Search results from LexisNexis search engine showing 22,584 entries for the surname “BreauX,” and with 25 listings made of record. The majority of the 25 listed individuals with the surname “BreauX” are located in Louisiana, with others located in Mississippi, Georgia, California and Ohio. *See* January 31, 2019 first Office Action at 10-11.
- Search results from the online dictionaries Merriam-Webster.com, OxfordDictionaries.com and CollinsDictionary.com showing no results for “BreauX” or “BreauXs.” *Id.* at 12-15; June 9, 2020 final Office Action at 9, 12.
- An article from the online news service SaintsWire.USAToday.com discussing former New Orleans Saints player Delvin BreauX. January 31, 2019 first Office Action at 16-17.
- An article from Fox8Live.com discussing D-D BreauX, head coach of Louisiana State University (LSU) gymnastics. *Id.* at 7-8.
- An article from HollywoodReporter.com discussing the death of Hollywood choreographer Marc BreauX. *Id.* at 9.
- Articles from AcadianMemorial.org and Acadian-Cajun.com discussing the non-standard spellings and misspellings of Acadian/Cajun names such as BreauX in phonetic forms, including Breau, Bro, Brau, Bread, Breault and Brot. Both websites indicate that Judge Paul Briant, who oversaw the 1820 U.S. Census in Louisiana, was largely responsible for beginning the widespread standardization of the spelling of Acadian/Cajun names, including BreauX, with the “eaux” ending. June 9, 2020 final Office Action at 5-8.
- Search results from ColumbiaGazeteer.org showing one city in Louisiana named BreauX Bridge and no place names including BreauXs. *Id.* at 10-11.

⁵ Page references herein to the application record refer to the .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, where applicable.

- A Wikipedia entry discussing various theories on the origin of the suffix “-eaux” in Acadian/Cajun names.⁶ *Id.* at 14.

This evidence demonstrates, and Applicant acknowledges,⁷ that “Breaux” is an actual surname, and is not rare. Recently, the Board determined that a surname was not rare even with an evidentiary showing much less substantial than the record adduced by the Examining Attorney in this case. In *In re Olin Corp.*, 124 USPQ2d 1327, 1330 (TTAB 2017), where the public records search returned only 7,552 hits and the 411.com matches numbered only 100, the Board also relied on other evidence comparable to that of record in this case to conclude that “OLIN is not rarely encountered as a surname, and therefore it is likely to be perceived by the public as having surname significance.” *Olin Corp.*, 124 USPQ2d at 1311. As indicated, the numbers from the public records database are far greater in this case.

We are not concerned that the evidence of record shows “Breaux” as a surname while Applicant’s mark is BREAUXS. The surname significance of a term is not diminished by the fact that the term is presented in its plural or possessive form. *See In re Binion*, 93 USPQ2d 1531 (TTAB 2009) (holding BINION and BINION’S primarily merely a surname); *In re Woolley’s Petite Suites*, 18 USPQ2d 1810 (TTAB

⁶ The Board gives guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question. *See, e.g., In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007). In the case before us, both Applicant and the Examining Attorney have relied on Wikipedia evidence, and both have been afforded an opportunity to rebut that submitted by the other.

⁷ 4 TTABVUE 7.

1991) (holding WOOLLEY'S PETITE SUITES for hotel and motel services primarily merely a surname); *In re McDonald's Corp.*, 230 USPQ 304, 306 (TTAB 1986) (holding MCDONALD'S primarily merely a surname based on a showing of surname significance of "McDonald," the Board noting that "it is clear that people use their surnames in possessive and plural forms to identify their businesses or trades"); *In re Luis Caballero, S.A.*, 223 USPQ 355 (TTAB 1984) (holding BURDONS primarily merely a surname based in part on telephone listings showing surname significance of "Burdon"); *In re Directional Mktg. Corp.*, 204 USPQ 675 (TTAB 1979) (holding DRUMMONDS primarily merely a surname based on a showing of surname significance of "Drummond").

B. BREAU(S) has regional recognition of a second meaning other than as a surname but that meaning is not applicable in the context of the identified goods.

With regard to whether "Breau(s)" possesses an "ordinary language meaning," the absence of dictionary entries for the applied-for mark creates a "strong inference" that the mark has no other non-surname meaning. *See Darty*, 225 USPQ at 653; *Adlon*, 120 USPQ2d at 1721. Evidence that a term has no recognized meaning or significance other than as a surname is relevant to determining whether the term would be perceived as primarily merely a surname. *See In re Weiss Watch Co.*, 123 USPQ2d 1200, 1203 (TTAB 2017); *In re Eximius Coffee, LLC*, 120 USPQ2d at 1280.

Applicant contends:

[T]his matter turns on whether Applicant has presented sufficient evidence showing that the mark BREAUXS will be perceived as carrying a non-surname meaning under the third inquiry.⁸

Applicant presented significant undisputed evidence regarding how BREAUXS would be understood to have an additional primary meaning as a play on the word BROS, such that the mark is not primarily merely a surname. BREAUX has a commonly understood meaning as a Cajun slang equivalent or play on the American slang BRO. The -EAUX ending is pronounced like 'O' and therefore BREAUX and BRO sound identical, and the reference to BREAUX in Applicant's mark BREAUXS will be perceived as referencing "bro" subculture.⁹

In support of the contention that BREAUXS will be perceived by consumers as possessing a second, non-surname meaning as a Cajun play on the term "bro,"

Applicant introduced into the record the following evidence:

- A Wikipedia entry discussing the term "Bro" as "a male youth subculture of conventional guys' guys who spend time partying in ways similar to each other. ... Bro once meant something specific: a self-absorbed young white guy in board shorts with a taste for cheap beer. But it's become a shorthand for the sort of privileged ignorance that thrives in groups dominated by wealthy, white, straight men." July 31, 2019 Response to first Office action at 16-20.
- Search results from the online dictionary OxfordDictionaries.com discussing evolution of the meaning of "bro" – from a reference to a male sibling "to refer simply to a man (a synonym for 'fellow' or 'guy'), or sometimes more specifically a black man." *Id.* at 21-42.
- An article from Dummies.com regarding ways to pluralize French nouns, e.g., fleur becomes fleurs, and manteau becomes manteaux. *Id.* at 43-44.
- A Wikipedia entry discussing the history of the Louisiana State University (LSU) Tigers collegiate football team, its stadium, schedule, and traditions. *Id.* at 45-78.

⁸ 4 TTABVUE 7.

⁹ *Id.*

- An article from LSUsports.net discussing that LSU displayed four billboards in Houston, TX displaying “Geaux Streaux” in recognition of two Houston Astros players who were former LSU Tigers. *Id.* at 79-81.
- An article from Slate.com discussing grilling, the traditional marketing of grills and grill accessories to men, and masculine culture traditionally surrounding grilling. *Id.* at 159-165.
- Search results from UrbanDictionary.com defining “breaux” as a synonym for “bro or brajh, but in this case it’s that guy in the bro crew that is fully cajun and all of this family memebers [sic] live in new orleans or anywhere in Louisiana for that matter.” The entry also recognizes “Breaux” and denoting “the international design label spearheaded by Mateo Breaux.” *Id.* at 100-105.
- An article from SaturdayDownSouth.com and other websites discussing various LSU football memes¹⁰ from recent years, including several instances of the term “bro” spelled “breaux,” such as the image below. *Id.* at 91-158.



¹⁰ A “meme” is “a cultural item in the form of an image, video, phrase, etc., that is spread via the Internet and often altered in a creative or humorous way.” Dictionary.com, accessed on June 10, 2021. Definition based upon THE RANDOM HOUSE UNABRIDGED DICTIONARY, (2021). The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format, *e.g.*, *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018), and we do so in this case.

Applicant posits that because “BREAUX has a commonly understood meaning as a Cajun slang equivalent or play on the American slang BRO”¹¹ and “the reference to BREAUX in Applicant’s mark BREAUXS will be perceived as referencing ‘bro’ subculture,”¹² the non-surname significance undercuts a claim that the proposed mark is primarily merely a surname. Applicant further argues that “grilling, and outdoor cooking more generally, is a quintessentially masculine American pastime, which marries well with the BRO subculture.”¹³ “And how else does one imagine a Cajun ‘breaux’ other than standing at a grill with other guys and beers in hand?”¹⁴

The Examining Attorney counters that the surname meaning is by far more familiar to consumers than the meaning of “breaux” as novel spelling of “bro.” The Examining Attorney argues that the entries for “breaux” meaning a Cajun “bro” in the Urban Dictionary discussed above were created in 2007 and 2009 and “applicant’s evidence showing an outdated slang term is not persuasive and does not establish that the modern purchasing public would perceive the mark as having a non-surname significance.”¹⁵ The Examining Attorney notes that the most current submission in Urban Dictionary, from 2016, regarding “breaux” refers to the designer Mateo Breaux. The Examining Attorney further argues that Applicant’s “evidence does not

¹¹ 4 TTABVUE 7.

¹² *Id.*

¹³ 4 TTABVUE 10.

¹⁴ 4 TTABVUE 11.

¹⁵ 6 TTABVUE 7.

show widespread use of the -EAUX suffix to create phonetic equivalents outside the fans of LSU football.”¹⁶

We agree. The evidence establishes that there is a non-surname meaning of “breaux,” but mere existence of other non-surname meanings of a mark does not preclude a finding that it is primarily merely a surname. Rather, we consider to what degree, if any, the public would associate the particular meaning with the goods or services in the application. *See Mitchell Miller, PC v. Miller*, 105 USPQ2d 1615, 1621 (TTAB 2013) (“the record is devoid of evidence that the non-surname meanings of MILLER, i.e., a mill operator or a moth, are the primary significance thereof or somehow eclipse its surname significance” in connection with legal services).

Applicant contends that “breaux” is an alternate spelling of “bro,” and that grilling is associated with “bros” and “bro culture.” However, on this record it is not clear to what extent, if any, the term “breaux” is understood to be synonymous with “bro” outside of fans of LSU athletics. Particularly given that a large percentage of individuals with the surname “Breaux” appear to live in Louisiana, it is more likely that consumers viewing BREAUXS will perceive the mark as a plural of the surname.

Contrary to Applicant’s arguments, we find that the facts and record in this case are not analogous to those in *In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994), wherein the Board found that evidence of record established a second meaning for “SAVA” as an acronym for “Securing America’s Valuable Assets.” Rather, we find on this record that the asserted association of “breaux” with “bro” and “bro

¹⁶ *Id.* at 10.

culture” with grilling is too attenuated to create in the minds of the consuming public such an association between Applicant’s BREAUXS mark and its goods. Applicant simply offers insufficient evidence why a consumer would associate BREAUXS with grilling, or grilling products, as opposed to the demonstrated surname meaning. Nor do we find that evidence of the single geographic location of Breaux Bridge, without any further evidence establishing its size, population or notoriety, creates a separate, non-surname meaning of the mark that would be associated by consumers with Applicant’s goods. Given the strength of the evidence of the surname significance of BREAUX(S), we find that the consumers would apply the surname meaning to Applicant’s mark.

C. BREAUXS has the structure and pronunciation of a surname.

Next, we determine whether BREAUXS has the structure and pronunciation of a surname. “Under this factor, a party may submit evidence that, due to a term’s structure and pronunciation, the public would or would not perceive it to have surname significance.” *Azeka Bldg. Corp.*, 122 USPQ2d at 1481. Typically, such evidentiary showing would involve proof of other common surnames that are configured similarly and sound similar to the mark. *See Eximius Coffee*, 120 USPQ2d at 1280 (would need proof that other terms with the suffix “OA” are common surnames to show a structure and pronunciation similar to ALDECOA); *Adlon Brand*, 120 USPQ2d at 1724 (“With the possible exception of Ablon and Allon, which differ from ADLON by one letter, the surnames cited are not highly similar in structure to ADLON”).

Applicant argues that “the addition of an S would be an additional tip-off to customers that the mark is not being used in the sense of a traditional French surname. An S is not commonly used in French to make plurals out of -EAU or -EAUX words.”¹⁷ However, there is no evidence of record that “Breaux” is a traditional French surname. To the contrary, the evidence in this case establishes that “Breaux” is an American surname of Acadian/Cajun origin, historically subject to inconsistent and non-traditional pluralization. Thus, consumers may well be accustomed to encountering BREAUXS as a plural form of “Breaux.”

We further note the Examining Attorney’s evidence that the -EAUX suffix is common among Acadian/Cajun surnames. This evidence tends to support and corroborate the Examining Attorney’s position that BREAUXS will be perceived as a surname. We note in addition that whether a term possesses the structure and pronunciation of a surname is a decidedly subjective determination. *See Adlon*, 120 USPQ2d at 1724 (rejecting an argument based on structure and pronunciation because “[w]ith respect to this difficult type of argument, we would require more objective evidence, whether from Applicant or the Examining Attorney, of how members of the public would perceive the structure and sound ... and whether they would be likely to perceive it as similar to the structure and sound of other surnames, common words or coined terms.”). There is no evidentiary support in the record for the position that BREAUXS lacks the structure and pronunciation of a surname or would be viewed as anything other than a surname. *See Adlon*, 120 USPQ2d at 1719

¹⁷ 4 TTABVUE 13.

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(stating that consideration will be given to whether the public may perceive the mark to be primarily a meaningless, coined term only “if there is evidence to so indicate”). “In order to show that the public would perceive a proposed mark as a coinage, in the face of evidence establishing that the mark is a surname with no other recognized meaning, some objective countervailing evidence of such a perception is required.” *Id.* at 1723. There is insufficient evidence in this case to support such a finding.

D. Conclusion

We find that the record, taken as a whole, establishes that the primary significance of BREAUXS to the purchasing public is merely that of a surname within the meaning of Section 2(e)(4).

Decision: The refusal to register Applicant’s mark under Section 2(e)(4) of the Trademark Act is affirmed.